

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1500-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF373

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERTO RIVERA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MICHAEL W. GAGE, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Alberto Rivera, pro se, appeals an order denying his motion for additional sentence credit. We agree with the State that, under the circumstances, the circuit court had no authority to amend Rivera's judgment of conviction to provide the sentence credit he requested. Accordingly, we affirm.

BACKGROUND

¶2 On October 30, 2006, Rivera entered no contest pleas to one count of possession with intent to deliver between five and fifteen grams of cocaine, as a party to a crime, and one count of felony bail jumping. He was sentenced on April 9, 2007. On the drug charge, the circuit court imposed and stayed a sentence of three years' initial confinement and three years' extended supervision, and it placed Rivera on probation for six years. The court ordered Rivera to serve twelve months in jail as a condition of probation, with credit for thirty-three days of presentence custody. On the bail jumping charge, the court withheld sentence and placed Rivera on probation for three years, concurrent to his probation term on the drug charge. As a condition of probation, Rivera was ordered to serve six months in jail, consecutive to his conditional jail time on the drug charge.

¶3 Rivera's appellate brief asserts that, on July 7, 2011, his probation was revoked, and he "began service of the stayed sentence."¹ On May 4, 2012, Rivera filed a motion for additional sentence credit, pursuant to WIS. STAT. § 973.155.² Rivera alleged he was entitled to credit for three additional days of presentence custody. He also contended he had served all of his conditional jail time on the drug and bail jumping charges and was therefore entitled to 517 days of credit. Rivera asked the circuit court to "issue an amended judgment of conviction reflecting 553 days [of] sentence credit."

¹ Although it is not completely clear on the record before us, it appears that Rivera had already completed his probation term on the bail jumping charge as of July 7, 2011, and he was therefore revoked only on the drug charge, which had a longer term of probation.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 The court denied Rivera’s motion. Regarding presentence custody, the court determined there was no basis to amend its finding that Rivera was entitled to credit for only thirty-three days. With respect to Rivera’s conditional jail time, the court reasoned, “The post-judgment calculation of credit for conditional time served on an imposed and stayed sentence is the province of the Department of Corrections, and the fact of serving the conditional time is not [a] basis to amend the judgment to modify credit for presentence confinement.” The court also stated that six months of Rivera’s conditional jail time were served in connection with the bail jumping charge and therefore could not be credited against his sentence on the drug charge. Rivera appeals.

DISCUSSION

¶5 WISCONSIN STAT. § 973.155(1)(a) provides that a convicted offender “shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.” Thus, for credit to be awarded, two requirements must be satisfied: “(1) the defendant must have been ‘in custody’ for the period in question; and (2) the period ‘in custody’ must have been ‘in connection with the course of conduct for which the sentence was imposed.’” *State v. Beiersdorf*, 208 Wis. 2d 492, 496, 561 N.W.2d 749 (Ct. App. 1997) (quoting WIS. STAT. § 973.155(1)(a)).

¶6 The State concedes that, under WIS. STAT. § 973.155(1)(a), Rivera would normally be entitled to credit for the one year he spent in jail as a condition

of his probation on the drug charge.³ See *State v. Gilbert*, 115 Wis. 2d 371, 377, 340 N.W.2d 511 (1983) (offender is entitled to sentence credit for jail time served as a condition of probation). However, the State argues that, under the circumstances, the circuit court did not have authority to amend Rivera's judgment of conviction to grant him additional sentence credit. We agree.

¶7 When a circuit court imposes and stays a sentence and orders probation, the offender does not return to court if his or her probation is revoked. Instead, upon revocation, the Department of Corrections orders the offender directly to prison to begin serving the sentence the court previously imposed. See WIS. STAT. § 973.10(2)(b). Either the Department of Corrections (if the offender waives a revocation hearing) or the Division of Hearings and Appeals (if a revocation hearing is held) calculates the offender's sentence credit and includes that figure in the revocation order. WIS. STAT. § 973.155(2). No new judgment of conviction is entered, and the circuit court does not have any role in calculating the offender's postrevocation sentence credit.

¶8 As a result, a motion to amend a judgment of conviction is not the proper avenue to challenge the amount of sentence credit set forth in a revocation order. Instead, the offender must challenge the revocation order itself by filing a petition for writ of certiorari. See *State ex rel. Cramer v. Court of Appeals*, 2000

³ Conversely, the State disputes Rivera's assertion that he is entitled to credit for the six months of conditional jail time he served in connection with the bail jumping charge. Specifically, the State contends the conditional jail time on the bail jumping charge was not connected to the course of conduct for which the sentence on the drug charge was imposed. See WIS. STAT. § 973.155(1)(a).

The State does not specifically address the merits of Rivera's argument that he is entitled to three additional days of credit for presentence custody.

WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591. Here, Rivera filed a motion to amend his judgment of conviction, instead of a petition for writ of certiorari. Because Rivera failed to follow the proper procedure, the circuit court had no authority to grant the relief he requested.

¶9 Rivera seems to suggest that, because he has no legal training, we should liberally construe his motion for sentence credit as a petition for writ of certiorari. However, even if we were to do so, we would nevertheless affirm the circuit court. As the State points out, a prisoner has forty-five days to file a petition for writ of certiorari challenging a revocation order. *See* WIS. STAT. § 893.735; *Cramer*, 236 Wis. 2d 473, ¶51. Rivera asserts his probation was revoked on July 7, 2011. His motion for sentence credit was not filed until May 4, 2012. The State asserts, and Rivera does not dispute, that Rivera failed to comply with the forty-five day deadline in WIS. STAT. § 893.735. Consequently, even if construed as a petition for writ of certiorari, Rivera’s motion for sentence credit would have been properly denied as untimely.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

